United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-1351

Brs

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO: 74-1351

IN THE MATTER OF

JACK ROBINSON,

BANKRUPT

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF NEW YORK AT
BANKRUPTCY NO. 71-376

BRIEF ON BEHALF OF PETITIONER-APPELLEE
MANUFACTURERS AND TRADERS TRUST COMPANY

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ORIGINAL

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 74-1351

In the Matter of

JACK ROBINSON,

Bankrupt-Appellant

BRIEF ON BEHALF OF PETITIONER-APPELLEE
MANUFACTURERS AND TRADERS TRUST COMPANY

Statement of the case

The finding of the Referee in favor of the Appellee Manufacturers and Traders Trust Company (hereinafter "Trust Company") granted the Trust Company's petition under Section 14 of the Bankruptcy Act (11 U. S. C. §32) with respect to a series of false answers given by the Bankrupt Robinson at the First Meeting of Creditors. The questions and answers dealt with events which had occurred in January, 1971, a few months prior to the bankruptcy proceeding. The Referee denied the Trust Company's petition under Section 14, insofar as it dealt with alleged false answers relating to the knowledge of the Bankrupt at an earlier time when he had signed and delivered to the Trust Company certain written financing statements, claimed by the Trust Company to have

been false. In view of the Referee's finding under Section 14, he did not consider or pass on the Trust Company's Section 17 (11 U. S. C. §35) application for determination of non-dischargeability.

The combined petition under Sections 14 and 17 was filed with the Referee on the last designated day, June 8, 1971. (Record, 1) At that time, pursuant to local requirement, the Trust Company deposited with the Referee a check in the amount of $50.00 as indemnity against expense of production of the record of our testimony in the proceeding then being initiated. The $20.00 fee required under the statute ($10.00 for the Section 14 petition and $10.00 for the Section 17 petition) was not paid, through oversight. That sum was paid to the Referee the following day, immediately after the expiration of the filing period. (Record, 172) The Referee's clerk, however, had permitted the petition to be filed on June 8, when it was initially presented, without prior payment of the fee. (Record, 1; 167) Filing therefore actually occurred within the designated period.

In May, 1969, the Bankrupt had filed with the Trust Company a financial statement showing, among other things, that the Bankrupt's net worth was $84,969.55, that the Bankrupt was engaged in business as a canned meat broker and that the Bankrupt had good accounts receivable totalling

approximately $27,000. (Record, 33-37)

Around December, 1969, the Bankrupt applied to the Trust Company for additional loans, representing orally that the accounts receivable contained in the statement were still outstanding and collectible. On the basis of the Bankrupt's entire financial situation, including this information regarding the accounts receivable, an additional loan of $17,000.00 was granted.

In January, 1971, the Bankrupt participated in conversations with the Trust Company in connection with the outstanding loan. In the course of these conversations, the Trust Company inquired specifically regarding the accounts receivable. The Bankrupt advised the Trust Company of specific accounts receivable then outstanding and owing in specified amounts totalling approximately $48,800.00. The discussions occurred in connection with review by the Trust Company of its loan position and available collateral under the security interest which the Trust Company had taken from the Bankrupt, covering, among other things, accounts receivable.

At the First Meeting of Creditors three months later, the Bankrupt, testifying under oath, denied having given the above information to the Trust Company, in response

to a series of detailed questions carefully directed to the events involved. (Record, 98-105) The Bankrupt further testified that no accounts receivable had in fact been in existence since 1970. (Record, 95) The Referee determined that the Bankrupt gave false testimony in making the denials at the First Meeting, justifying the denial of his discharge.

ARGUMENT

POINT I

THE APPELLEE TRUST COMPANY FILED ITS OBJECTIONS TO THE DISCHARGE OF THE BANKRUPT IN A TIMELY MANNER

The Referee correctly denied the Bankrupt's motion to dismiss the petition based upon its alleged late filing. While the statutory fee of $10.00 for the Section 14 petition was paid one day after the deadline for filing, the petition was in fact accepted for filing within the proper time period. Moreover, the substantial purposes of any requirement for simultaneous filing of the filing fee were met, inasmuch as the Trust Company delivered a sum of $50.00 to the Referee simultaneously with filing of the petition, a portion of which could have been applied by the Referee to the filing fee.

1. Petitioner did not fail to timely file the $10.00 filing fee.

The $50.00 check paid to the Referee as indemnity was paid on June 8, within the proper time period specified for filing of the petition. Although intended by the Trust Company as indemnity against expenses, there was no restriction preventing immediate cashing of the check and use of $10.00 thereof to satisfy the filing fee on the Section 14 application. The issue would be material if the clerk had elected to refuse to file the petition because of nonpayment. Instead, however, the clerk in fact filed the petition and requested a separate check which was promptly remitted.

The purpose of the statutory scheme is clear. On the one hand, a final date is specified to permit clear determination by the court and the Bankrupt whether any objection to discharge or petition for non-dischargeability declaration is going to be filed. Bankruptcy Act §14-b(1). Notice of that application within the time fixed was given and the petition in fact filed. The second purpose is to provide for the receipt by the Court of the filing fee, representing a nominal cash payment of $10.00, to assist in the financing of the Court's operations. As separate as it is from the merits, the clerk may nonetheless refuse to file the document if the fee is not submitted and is bound to account for

the fee, whether or not submitted. Bankruptcy Act §51 (11 U. S. C. §79).

In this connection, General Order 10, in effect at the time, merely provided as follows:

> "Before incurring any expense in procuring the attendance of witnesses or in perpetuating testimony, the clerk . . . or referee may require, from the bankrupt, debtor or other persons in whose behalf the duty is to be performed, indemnity for such expense."

There was no statutory or other requirement for the payment of $50.00 to the Court as a prerequisite for the filing of the petition (as opposed to deposit prior to the actual incurrence of expense by the Referee). The funds provided were fully available for the payment of the filing fee. The stenographic convenience in requesting a check for the precise amount of the filing fee rather than "breaking" the check for the larger amount is no evidence of non-payment of the fee.

2. Failure to pay the fee prior to the filing of the document is not a basis for dismissal of the proceeding where the Court in fact filed the document and the fee was subsequently and promptly paid.

Section 14-b(1) directs issuance of notice of the deadline for filing both Section 14 and Section 17 applica-

tions. The notice to creditors specified the "last day for the filing" of the respective documents as of June 8, 1971. The petition was filed on the "last day".

General Order 2, in effect at the time in question, directed that the clerk mark each paper with the date of filing (and the hour in the case of an original petition). The clerk marked petitioner's objections to discharge with the filing date when it was submitted and accepted. In every conceivable view, filing within the designated time occurred.

To uphold the Bankrupt's argument that timely filing did not occur, it must be held that although filing did occur on the last day for filing, it should not have occurred on that day and, therefore, it did not. Strained as this logic is on the face of it, it is not even supported by an accurate underlying premise.

The purpose of a deadline and the requirement of filing is to bring the matter to an end and permit expeditious determination whether there is an issue which should prevent the granting of the order of discharge in whole or in part. The fact of filing served this purpose completely, whether or not the fee was previously received.

While payment of the fee is required, nowhere does it appear that payment subsequent to filing but prior to

action on the paper makes the proceeding defective. The statute requires that additional fees be charged in accordance with a schedule to be prepared by the Judicial Conference. [Bankruptcy Act §40-c(2), 11 U.S.C. §68-c(2)]. The Judicial Conference has fixed the $10.00 fee by formal action. [2 Collier on Bankruptcy 1575 (14th ed.)]. While Section 51 (11 U. S. C. §79) sets out the duties of the Clerk of the District Court in regard to collection of fees and, in subdivisions (2) and (3), specifies that collection shall occur before filing the paper where original petitions are involved (rather than motions in an established proceeding), Section 40-c(3) [11 U. S. C. §68-c(3)] merely directs that the Referee collect charges for special services in accordance with directions of the Judicial Conference. The Conference has specified the amount of the fee. The Referee is then required to remit the same to the Clerk of the Court for payment in connection with the closing of the estate. Bankruptcy Act, §§40-c(3), 51(2).

The Referee dismissed Appellant Robinson's argument on this point, with reference to Manual of Office Procedures for Bankruptcy Clerks (Record, 514), an extract copy of which is annexed as an appendix to this Brief.

Nowhere, except in connection with the filing of original petitions conferring jurisdiction on the Court, is

there any intimation of a fixed requirement of payment before filing of the paper. Furthermore, no cases have been found where the failure to pay before filing, corrected promptly thereafter, was held to constitute a jurisdictional defect to the proceeding.

In conclusion, it should be noted that Section 14-b(2) of the Act and United States v. Kras cited by the Bankrupt (Appellant's Brief, p. 7) each relate to the filing fee required in connection with the filing of the original petition.

POINT II

THE FINDING OF THE REFEREE DENYING THE BANKRUPT HIS DISCHARGE BECAUSE OF HIS FALSE STATEMENTS UNDER OATH IS FOUNDED ON SUFFICIENT EVIDENCE AND SHOULD BE UPHELD BY THIS COURT. THE FALSE STATEMENTS WERE MADE IN CONNECTION WITH MATTER WHICH WAS MATERIAL TO THE ADMINISTRATION OF THE ESTATE.

The Referee found that the Bankrupt gave false and fraudulent testimony with respect to the inquiries on the January 1971 conversations only. (Record, 514-15) Reference by Appellant Robinson to other alleged false testimony (Appellant's Brief, pp. 10-12) is not relevant to this appeal, the Trust Company's claim having been rejected by the Referee.

The Referee had the benefit of observation of the witnesses at the hearing. His findings of fact are binding on this appeal in the absence of clear error. While this rule is especially true on the determination that the Bankrupt knowingly made a false oath, it is also applicable to the inference of ultimate fact that the false testimony was fraudulently given. In re Tabibian, 289 F.2d 793, 795 (2nd Cir. 1961)

The prevarication of the Bankrupt with respect to the particulars specified by the Referee (Record, 515; 23-24) is most clear. Mr. Spitzmiller testified as to obtaining the names and amounts of accounts receivable from Mr. Robinson, together with assurances that these were personal accounts receivable (Record, 260), together with recital of the subsequent meeting between himself, Mr. George Sheldon, the Bankrupt and his then counsel, Mr. Pressman. (Record, 268 et seq.) The testimony given conforms with that by George Sheldon in material particulars. (Record, 201 et seq.)

By contrast, the most the Bankrupt would concede was that Spitzmiller and the Bankrupt had initially discussed whether the Bankrupt had these same customers he had previously had (Record, 456) and that, at the subsequent meeting with George Sheldon, Mr. Sheldon "mentioned a few names". (Record, 460). The Bankrupt was under "extreme pressure" from his

other creditors at that time. (Record, 459). He confirmed that Mr. Sheldon had inquired regarding any people he owed money to and that "we threw in" a few names for the benefit of the bankers. (Record, 461).

The flavor of the situation is clear. Robinson felt it necessary to lie to the Bank at the January, 1971 meetings, and, subsequently, when he was under oath before this Court, to deny that he had lied. The initial prevarication is quite understandable. Robinson had merely come in to make his monthly payment in January, 1971, only to be approached by Mr. Spitzmiller with regard to the unpaid outstanding loan. (Record, 455) At a time when Mr. Robinson was experiencing difficulty in paying his debts and the "extreme pressure and difficulties" from "a lot of creditors" (Record, 459), the last thing he needed was this kind of consultation from the Trust Company. His only defense, he must have thought, was to reassure the Bank and attempt to put it off by concealing true facts concerning his financial condition.

In light of the recent nature of the events when Mr. Robinson was interrogated at the First Meeting on April 16, 1971, the detailed presentation of inquiries regarding the January conversations and Mr. Robinson's categoric denials, there could be no doubt that the false statements under oath

at the First Meeting were willful and intentional. Appellant Robinson attempts to gloss over this by general reference to unspecified "conflict" in the testimony of the Trust Company's witnesses. (Appellant's Brief, pp. 12-13; 20) The Referee's finding of the material facts is clearly supported by the evidence, however.

As to the question of materiality, the case resembles In Re Zirvos, 428 F.2d 1203 (9th Cir. 1970). The bankrupt's falsification there was his statement that he had not previously given financial information to Dun & Bradstreet and lacked knowledge thereof. See also In Re Zoffer, 211 Fed. 936 (2d Cir. 1914), wherein the bankrupt swore that he had never made a statement of financial condition to anyone, when in fact he had done so.

Note also In Re Suzick, 25 F.Supp. 248 (W.D. Pa. 1938), wherein the false statement by the bankrupt that he had given $50.00 to another party to permit that party to bid at the bankrupt's bankruptcy sale was deemed sufficient perjury to justify denial of discharge. Had the bankrupt answered truthfully, "inquiry could properly be made" as to how the money had come into his hands. Such inquiry was stopped by the false testimony.

Similarly here, the inconsistency between the bank-

rupt's petition and schedules and the statements made prior to the bankruptcy proceedings regarding alleged assets, if demonstrated by the bankrupt's own honest admissions, would have permitted extended and potentially fruitful inquiry into the bankrupt's financial affairs, the outcome of which cannot be predicted at this late date. The First Meeting, of course, is an opportunity for creditors to obtain full and honest disclosure from bankrupts. The courts should not shirk from denying discharge to one who has openly and flagrantly perjured himself for his own individual ends when his clear responsibility under the Bankruptcy Act was to do otherwise.

Cases cited by Appellant Robinson are generally distinguishable on the facts. In many instances, the false testimony was fleeting, incidental and not clearly brought home to the bankrupt in a way to assure that his testimony was intentionally falsely made. Thus, Matter of Taub, 98 F.2d 81 (2d Cir. 1938), involved the failure of the bankrupt to list in his schedules two life insurance policies, one of which had no cash surrender value and the other of which had value of only 49 cents. Mere omission of property from the schedules did not necessarily establish fraudulent intent on the part of the bankrupt. The lack of value in the property tended to negate any fraudulent intent on the part of the bankrupt in omitting the information. What motive, after all, would the

bankrupt have had to purposely omit these worthless assets? Ibid. at 82.

In Tancer v. Wales, 156 F.2d 627 (2d Cir. 1946), the failure to include two patents in the bankruptcy schedules was due to secretarial mistake, and the omission of reference to certain pending contract negotiations dealt with a situation where only an option was held by the other party, which option was never taken up. Again, the showing of any actual fraudulent intent in making the omission was found totally absent.

Like Taub and Tancer, In re Tabibian, supra, involved a situation where the bankrupt seemed to have a plausible excuse for the false statement. All facts considered convinced this Court that the bankrupt's "state of mind" at the time of the giving of the false testimony had not included any actual fraudulent intent. Ibid. 796-97. The Court makes clear its great concern at the false reply to the question of prior transfers on the bankrupt's Statement of Affairs, even though it is plain that a truthful answer would apparently not have benefitted the bankrupt's estate monetarily in any way. The Court failed to find the Referee clearly erroneous and thus upheld his finding that no fraudulent intent was present.

Willoughby v. Jamison, 103 Fed. 21 (8th Cir. 1938), is another incident where the erroneous testimony could have clearly resulted from innocent mistake, and the answer related to the property of the wife of the bankrupt anyway, not in any way to property which belonged to the bankrupt.

While In re Chamberlain, 180 Fed. 304 (D.C.N.Y. 1910), involved some extenuating circumstances (the bankrupt was hard of hearing, for example, and may not have correctly heard a conversation as to which he allegedly testified falsely), the rationale of the court is difficult to distinguish from the facts on this appeal. The holding of the case is not fully in keeping with the tenor of subsequent holdings of this Court, however, and should not control the decision herein.

This Court has previously held that an intentional untruth to a material matter was all that was required to justify denial of discharge. See In re Steinberg, 143 F.2d 942 (2d Cir. 1944) at 943:

> "We regard it therefore as settled doctrine that, if a bankrupt consciously answers to what he knows to be untrue, it makes no difference that he does not mean by doing so to injure his creditors." Morris Plan Industrial Bank v. Finn, 149 F.2d 591 (2d Cir. 1945).

The older view that the word "fraudulently" has, in effect, been read out of the statute (In re Steinberg, supra at 943) is not the present view of the courts. Nonetheless,

in construing what is required to meet the "knowingly and fraudulently" standard, this Court has evinced primary concern in the degree of the bankrupt's culpability in false swearing.

> "The criticism, however, would seem to be one of verbiage rather than reality, for the utterance of 'an intentional untruth in a matter material to the issue which is itself material' is no more than a characterization of what is sufficient to justify an inference of an intent to defraud the bankrupt's creditors. If a bankrupt swears falsely in a matter material to the issue, it is hard to see why he has not acted 'knowingly and fraudulently' though it may be wiser to use the words of the statute, i. e., 'knowingly and fraudulently,' which the referee did use in the language he adopted in the case at bar." Tancer v. Wales, supra at 627.

While the petitioning creditor must prove a fraudulent intent under current interpretations, this requirement should be satisfied where it is clear that there are no extenuating facts or circumstances to explain away the false statements, the questions put and answers given relate to material inquiries made in connection with the administration of the bankruptcy estate (without begging the question whether the result of truthful answers will definitely be enrichment of the estate), and it is eminently clear that the false answers have been made purposely in an effort to conceal the truth from the creditors' inquiry and thereby terminate inquiry. Robinson's false testimony was clearly fraudulently made and not given through inadvertence, mistake, confusion or the like.

> "Successful administration of the Bankruptcy Act hangs heavily on the veracity of statements made by the bankrupt. . . . Statements called for in the schedules, or made under oath in answer to questions propounded during the bankrupt's examination or otherwise, must be regarded as serious business; reckless indifference to the truth, which is the kindest attitude that can be taken toward Diorio's affidavit, is the equivalent of fraud. There was here no such proof of circumstances extenuating the making of false statements as in In re Tabibian. . . or Avallone v. Gross. . . ."
> In re Diorio, 407 F.2d 1330, 1331 (2d Cir. 1969) [Emphasis added].

Likewise, here, the matters posed to the Bankrupt were encompassed in a series of specific questions. The Bankrupt argues on this appeal that he was confused. At best from his point of view, his answers indicate evasiveness. The Referee could properly conclude that the Bankrupt fully understood the inquiries being made and willfully and recklessly testified falsely in total disregard to the truth. Maintenance of an effective bankruptcy system requires imposition of the penalty of denial of discharge in the face of blatant false testimony in bankruptcy proceedings.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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A D D E N D U M

1. Bankruptcy Act, §14-b(1) and (2), 11 U. S. C. §32-b(1) and (2)

> "(b)(1) The Court shall make an order fixing a time for the filing of objections to the bankrupt's discharge and a time for the filing of applications pursuant to paragraph (2) of subdivision c of section 17 of this Act to determine the dischargeability of debts, which time or times shall be not less than thirty days nor more than ninety days after the first date set for the first meeting of creditors. Notice of such order shall be given to all parties in interest as provided in section 58b of this Act. The Court may, upon its own motion or, for cause shown, upon motion of any party in interest, extend the time or times for filing such objections or applications.
>
> "(2) Upon the expiration of the time fixed in the order for filing objections or of any extension of such time granted by the court, the court shall discharge the bankrupt if no objection has been filed and if the filing fees required to be paid by this Act have been paid in full; otherwise, the court shall hear such proofs and pleas as may be made in opposition to the discharge, by the trustee, creditors, the United States attorney, or such other attorney as the Attorney General may designate, at such time as will give the bankrupt and the objecting parties a reasonable opportunity to be fully heard."

2. Bankruptcy Act, §40-c(2) and (3), 11 U. S. C. §68-c(2) and (3)

> "(2) Additional fees for the referees' salary and expense fund shall be charged, in accordance with the schedule fixed by the conference. . . . The Director, with the approval of the conference, may make, and from time to time amend, rules and regulations. . . prescribing the procedure for collection by the clerk of the fees and allowances for the referees' salary and expense fund. . . .
>
> "(3) Charges for the expense of special services relating to or in connection with proceedings before

referees shall be made and collected by the referees in accordance with regulations to be prescribed by the Director, with the approval of the conference, and the proceeds shall be paid by the referees to the clerk for transmission to the Treasury of the United States for deposit in the referees' expense fund."

3. Bankruptcy Act, §51, 11 U. S. C. §79

"Clerks shall . . . (2) collect the fees of the clerk and trustee and the fees for the referees' salary and expense fund provided in paragraph (1) of subdivision c of section 40 of this Act in each case instituted before filing the petition, except where installment payments may be authorized pursuant to section 40 of this Act, and collect the various other fees, allowances and charges for the services of referees and for their expenses, including their services and expenses as conciliation commissioners and as special masters under this Act; (3) collect the fees of the clerk and referee in each ancillary proceeding before filing the petition whereby the ancillary proceeding is instituted. . . ."

4. Bankruptcy Act, General Order No. 2

"Order 2. Filing of Papers
The clerk or the referee shall indorse on each paper filed with him the day, and in the case of the original petition, the day and hour, of filing."

5. Bankruptcy Act, General Order No. 10

"Order 10. Indemnity for Expenses.
Before incurring any expense in procuring the attendance of witnesses or in perpetuating testimony, the clerk, marshal, or referee may require, from the bankrupt, debtor, or other person in whose behalf the duty is to be performed, indemnity for such expense. Money advanced for this purpose by the bankrupt, debtor, or other person shall be repaid him out of the estate as part of the cost of administering the same."

APPENDIX TO APPELLEE'S BRIEF

Extract copy, Manual of Office Procedures for Bankruptcy Clerks, Federal Judicial Center, Revised 1972*

[Page 1]

I.

THE RECEIPT AND STAMPING OF LEGAL PAPERS AND CORRESPONDENCE

The volume of legal papers, correspondence and other writings that is constantly received in the average Referee's office is large. This is understandable when one considers that any bankruptcy proceeding involves not only the debtor or bankrupt, but also the interests, money and property of his many creditors. As a consequence, in any one office the interests of thousands of creditors will in one way or another be brought to the attention of the clerical staff of the Referee. To handle this flow of papers and communications is the role of the clerks of the Referee's office. In a very real sense the efficient operation of the Referee's office is greatly dependent upon how well these materials are handled by the clerks.

It is essential that every Referee's office be furnished with several stamping devices. There should be a stamp marked "Filed" and, if desired, another marked, "Received". Each should include a dating device. All documents, no matter what their character, will be stamped either "Received" or "Filed". Correspondence, including all types of communications, should

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always be stamped, "Received". However, legal pleadings, proofs of claim, applications or other legal forms are invariably stamped, "Filed". As a general rule, the materials which call for a "Filed" stamping will be those to be entered in the Docket or Claims Register, the details of which are discussed below. Another basic rubber stamp would be one for Certifications.

Certain filings require payment of a filing fee; i.e., a petition to review a referee's order or an application to reclaim property requires a $10.00 filing fee.

Where such papers are offered for filing without the proper fee, they should nevertheless be accepted for filing and a notation made on the paper itself that the filing fee has not been paid. The matter should then be called to the referee's attention.

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*The Foreword to the Manual indicates it was originally published by the Eastern Regional Conference, a voluntary association organized by Referees on the Eastern Seaboard. The 1972 Revision was published by the Federal Judicial Center and distributed to the Referees in Bankruptcy throughout the country by cover letter from H. Kent Presson, Assistant Chief of Bankruptcy, Administrative Office of the United States Courts, under date of November 14, 1972. Referee McGuire cited page 2 of the Manual in his initial decision on this matter. (Record, 514)

ADMISSION OF SERVICE OF APPELLEE'S BRIEF

The undersigned, Saperston, Wiltse, Day & Wilson, attorneys for Appellant Jack Robinson, hereby acknowledge service of two copies of Appellee's Brief, annexed hereto, this 28th day of May, 1974, by personal services at the offices of the undersigned, Liberty Bank Building, Buffalo, New York.

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